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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TRACI RIBEIRO, on behalf of herself and all
others similarly situated,

Plaintiff,

v.

SEDGWICK LLP,

Defendant.

Case No. 3:16-CV-4507 WHA

**REPLY IN SUPPORT OF DEFENDANT
SEDGWICK LLP'S MOTION FOR AN
ORDER COMPELLING ARBITRATION
AND STAYING CIVIL ACTION PENDING
ARBITRATION**

*[Filed concurrently with Declarations of Bruce
D. Celebrezze and Nick C. Geannacopulos;
[Proposed] Order]*

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I. INTRODUCTION

Plaintiff’s brief is a study in “hide the ball” legal practice — it conveniently ignores on-point legal precedent while obfuscating the underlying facts. **SEALED**

Thus, this Court’s analysis is limited to whether Sedgwick LLP’s claim for arbitration is “wholly groundless.” It is not. **SEALED**

The gravamen of Plaintiff’s complaint is that she, as a partner in the firm, was unfairly compensated and not elected to the equity partnership. **SEALED**

Because the questions of whether Plaintiff is an “employee” and, if so, **SEALED**, any analysis is premature. That said, Plaintiff is indisputably not an employee subject to the whims of an employer — despite her attempts to construct a tale to the contrary. Plaintiff is a **SEALED** partner in Sedgwick with valuable voting rights not afforded to employees. Her self-serving portrayal as a frail powerless pushover is belied by the representations she has made to her fellow partners and clients for years, that she is an insightful, strong, tough litigator ready to advance the client’s interests. Plaintiff’s control over her own destiny is shown by the leaps and bounds she has made since arriving at the firm. **SEALED**

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1 **SEALED**

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4 Plaintiff is a sophisticated and experienced attorney who wanted to be a partner at Sedgwick,
5 accepted the firm's offer of partnership nearly five years ago, and thereafter has consistently participated
6 in and enjoyed all of the rights and privileges of partnership in the firm under the Partnership
7 Agreement. Her complaints regarding the Partnership Agreement she signed twice – once nearly five
8 years ago and again four years ago – after receiving all of the benefits of partnership, and never before
9 uttering any concerns whatsoever about the Partnership Agreement, ring hollow. If she was not satisfied
10 with the Partnership Agreement, she had multiple opportunities to raise her concerns with firm
11 leadership or to withdraw from the partnership and join another law firm. She did neither.

12 Plaintiff is not a naif who was coerced into signing the Partnership Agreement she now seeks to
13 disclaim. She was free to accept or decline Sedgwick's offer of partnership at any time, before or after
14 reviewing the Partnership Agreement, just as she was free to withdraw from the partnership at any time.
15 Yet, until now, not surprisingly, **SEALED**, she was perfectly happy to
16 accept all of the benefits which flowed from being a Sedgwick partner.

17 In sum, Plaintiff's assent to the Partnership Agreement's terms was not given under duress;
18 rather it was for the parties' mutual benefit. Plaintiff has reaped significant rewards derivative from her
19 affiliation with the Sedgwick partnership. As will be shown, her protestations to the contrary are wholly
20 disingenuous.

21 **II. LEGAL ARGUMENT**

22 **A. **SEALED****

23
24 Plaintiff's brief focuses on the sequential order regarding a decision on this motion. This is odd,
25 as Sedgwick agrees with Plaintiff as to the order of operations. She states correctly that the first step is
26

27 ²

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1 “analyzing whether a valid agreement exists.” (Pl. Opp. at 7:10). Where the parties — and legal
2 authority — diverge is on the question of which entity should make this determination.

3 Absent agreement, this question would generally be left to the Court. But as with any term in an
4 arbitration agreement, the parties can contract around this default principle **SEALED**. *See,*
5 *e.g., Zenelaj v. Handybook Inc.*, 82 F.Supp.3d 968, 973 (N.D.Cal. 2015) (finding parties had clearly and
6 unmistakably agreed to have the arbitrator determine the gateway question of unconscionability where
7 the agreement incorporated the AAA Rules); *Tiri v. Lucky Chances, Inc.*, 226 Cal.App.4th 231, 241
8 (2014) (“[p]arties to an arbitration agreement may agree to delegate to the arbitrator, instead of a court,
9 questions regarding the enforceability of the agreement.”); *Kimble v. Rhodes Coll., Inc.*, No. 10–5786–
10 EMC, 2011 WL 2175249, at *2–4 (N.D.Cal. June 2, 2011) (finding that reference to the AAA Rules
11 manifests “clear and unmistakable evidence of the parties’ agreement to arbitrate arbitrability”); *Clarium*
12 *Capital Mgmt. LLC v. Choudhury*, No. 08–5157–SBA, 2009 WL 331588, at *5 (N.D.Cal. Feb. 11, 2009)
13 (“When the arbitration agreement explicitly incorporate[s] rules that empower an arbitrator to decide
14 issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties’ intent
15 to delegate such issues to an arbitrator.”); *Visa USA, Inc. v. Maritz, Inc.*, No. 07–05585–JSW, 2008 WL
16 744832 (N.D.Cal. Mar. 18, 2008) (holding the same); *Anderson v. Pitney Bowes, Inc.*, No. 04–4808–
17 SBA, 2005 WL 1048700, at *2–4 (N.D.Cal. May 4, 2005) (same); *Rodriguez v. American Technologies,*
18 *Inc.*, 136 Cal.App.4th 1110, 1123 (2006); *Dream Theater, Inc. v. Dream Theater*, 124 Cal.App.4th 547,
19 550 (2004).

20 Plaintiff simply ignores the controlling authority regarding the parties’ ability to contractually
21 agree to have these gateway issues decided by the arbitrator and presumes this Court will not look under
22 the hood. *Zenelaj v. Handybook*, 82 F.Supp.3d 968 (N.D.Cal. 2015), sets forth the guiding principles
23 applicable to this matter. The plaintiffs there were independent cleaning professionals who used the
24 defendant’s platform to connect with customers. *Id.* at 970. They filed a class action claiming
25 misclassification as independent contractors and the defendant sought to compel arbitration. *Id.* The
26 plaintiffs argued that the arbitration provision of their contract with defendant was unconscionable and,
27 further, that their claims for misclassification were not covered as they did not “relate to” the agreement.
28 *Id.* at 971. The defendant countered that the “Court cannot decide whether the arbitration provision in

1 this case is unconscionable or applicable, because the arbitration provision delegates those threshold
 2 issues to an arbitrator.” *Id.* Specifically, it argued that the parties “‘clearly and unmistakably’ agreed to
 3 allow an arbitrator to decide the arbitration provision’s validity, scope, and application, because the
 4 arbitration provision expressly incorporates the AAA Commercial Arbitration Rules” which delegate
 5 “all jurisdictional questions, including arbitrability and validity, to the arbitrator.” *Id.* The court agreed,
 6 noting that “the overwhelming consensus of other circuits, as well as the vast majority of decisions in
 7 [the Northern] district [of California] support Defendant’s claim that . . . incorporation of the AAA
 8 Rules effectively delegates jurisdictional questions, including arbitrability and **validity** to the arbitrator.”
 9 *Id.* at 972 (Emphasis added).

10 **SEALED**

18 **SEALED**

22 What is more, the incorporation of the JAMS rules definitively closes the issue. Rule 11 of the
 23 JAMS Comprehensive Rules reads clearly and unmistakably:

24 Jurisdictional and arbitrability disputes, including disputes over the **formation**, existence,
 25 **validity**, interpretation or scope of the agreement under which Arbitration is sought, and
 26 who are proper Parties to the Arbitration, **shall** be submitted to and ruled on by the
 Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability
 issues as a preliminary matter. JAMS Rule 11 (Emphases added).³

27 ³ While JAMS has since decided the matter should be heard under the Employment Arbitration
 28 Rules, it makes no difference. The Employment Arbitration Rules, Rule 11 contains identical delegation
 language.

1 “In cases where the parties clearly and unmistakably intend to delegate the power to decide
 2 arbitrability to an arbitrator, **a court’s inquiry is limited** to whether the assertion of arbitrability is
 3 wholly groundless.” *Id.* at 975 (internal quotations omitted; emphasis added); *see also Qualcomm Inc.*
 4 *v. Nokia Corp.*, 466 F.3d 1366, 1371 (Fed.Cir. 2006) (applying Ninth Circuit law). In applying this
 5 “wholly groundless” analysis, the *Zenelaj* court compared the plaintiffs’ claims with the topics the
 6 agreement containing the arbitration agreement purported to cover. *Zenelaj*, 82 F.Supp.3d at 975. It
 7 determined that their misclassification claims did indeed relate to the agreement for a number of reasons.
 8 It noted that, for example, the misclassification claims related to “the money [the plaintiffs] earned or
 9 were entitled to for the cleaning services they offered through Defendant’s platform” — and the
 10 agreement containing the arbitration provision dealt with how plaintiffs would be paid. *Id.* Further, it
 11 determined that “much of the evidence that will be considered to determine whether Plaintiffs were
 12 properly classified as independent contractors is found in the provisions of the contract.” *Id.*

13 Similarly here, Plaintiff’s claims are inextricably intertwined with the agreement to arbitrate.
 14 The gravamen of her complaint is that she, as a partner in the firm, was unfairly compensated and denied
 15 election to the equity partnership. **SEALED**

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 17
 18 As such, this matter must be referred to the arbitrator for any determination as to arbitrability —
 19 including validity and scope.

20 **B. The Question of Whether Plaintiff is an Employee is for the Arbitrator, But the**
 21 **Indisputable Facts Demonstrate She is Not, Regardless.**

22 While Plaintiff contorts the facts to push her agenda that, **SEALED**
 23 , she somehow remains an employee,
 24 the reality is otherwise. **SEALED**

1 **SEALED**

8 **SEALED**

19 It is utterly cynical for Plaintiff to suggest otherwise. **SEALED**

25 More recently, she even put forth a candidate for non-equity partner. (*Id.* at ¶ 8)

26 **SEALED**

1 **SEALED** Such quisling is more than disconcerting for a member of any bar, especially one
2 seeking to represent a putative class, and a lawyer who owes fiduciary duties to her fellow partners.

3 **SEALED**
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10 Courts in similar cases have rightly found that partners such as Plaintiff are not employees for
11 the purposes of bringing the claims she asserts here. *See e.g., Serapion v. Martinez*, 119 F.3d 982, 992
12 (1st Cir. 1997) (finding a law firm partner was not an employee entitled to bring suit under Title VII
13 where “her compensation depended substantially on the Firm’s fortunes” and “she enjoyed significant
14 voting rights in the Firm’s two principal governing bodies.”); *Wheeler v. Hurdman*, 825 F.2d 257, 260
15 (10th Cir. 1987), cert. denied, 484 U.S. 986 (1987) (holding partner was not “employee” entitled to
16 bring suit under Title VII, Age Discrimination in Employment Act, or Equal Pay Act and doing so in
17 part because the plaintiff’s compensation changed from salary to a draw that incorporated profits and
18 losses in its calculation); *accord, Fountain v. Metcalf, Zima & Co., P.A.*, 925 F.2d 1398, 1401 (11th Cir.
19 1991); *see also, Burke v. Friedman*, 556 F.2d 867 (7th Cir. 1977) (partners of accounting firm not
20 employees for purpose of Title VII).

21 Plaintiff cites three cases in contending that she should be found an employee: the first, *Strother*
22 *v. S. Cal. Permanente Med. Group*, 79 F.3d 859, 867-68 (9th Cir. 1996), simply states the truism that the
23 deciding body must analyze the true relationship among partners to determine whether they are
24 employees. (Pl. Opp. at 9:3-4). The second, *Panepucci v. Honigman Miller Schwartz & Cohn, LLP*,
25 408 F.Supp.2d 374, 377-78 (E.D.Mich. 2005), denied the law firm’s motion to dismiss *without*
26 *prejudice*, noting that “evidence weighs in part toward a finding that plaintiff is an employee, and in part
27 that she had the real ability to exercise control over the organization” and stating such a motion would
28

1 be better decided after additional fact discovery. *Id.* at 377.⁴ The final case Plaintiff cites provides no
 2 further assistance. It merely articulates one test for determination of whether the plaintiff is an
 3 employee:

4 [C]ourts have... established a three-part economic realities test consisting of at least the
 5 following factors: (1) the extent of an individual's ability to control and operate the
 6 business as evidenced by participation in policy decisions; (2) the extent to which an
 7 individual's compensation is based on a percentage of business profits; and (3) the extent
 of employment security enjoyed by the individual. *Rosenblatt v. Bivona & Cohen, P.C.*,
 969 F. Supp. 207, 215 (S.D.N.Y. 1997).

8 After noting this test the court explained: "**Both parties agree that plaintiff's employment was at-will,**
 9 thereby precluding his classification as a non-employee partner." *Id.*

10 **SEALED**

11
 12
 13 Even members of the United States Supreme Court have counseled against deeming a law firm
 14 partner an employee in instances such as the current matter:

15 The Court's opinion should not be read as extending Title VII to the management of a
 16 law firm by its partners. The reasoning of the Court's opinion does not require that the
 17 relationship among partners be characterized as an "employment" relationship to which
 Title VII would apply. The relationship among law partners differs markedly from that
 18 between employer and employee—including that between the partnership and its
 19 associates. The judgmental and sensitive decisions that must be made among the partners
 embrace a wide range of subjects. The essence of the law partnership is the common
 20 conduct of a shared enterprise. The relationship among law partners contemplates that
 decisions important to the partnership normally will be made by common agreement.
Hishon v. King & Spalding, 467 U.S. 69, 79–80, (1984) (J. Powell, concurring).

21 **SEALED**

22 Regardless, it is Plaintiff's burden to show the ADR Provision here is unenforceable, and, if
 23 her claim of unenforceability rests on her asserted "employee" status, proof of such status is her burden
 24 as well. *Arguelles-Romero v. Superior Court*, 184 Cal.App.4th 825, 836 (2010) ("The party opposing

25
 26 ⁴ Plaintiff also fails to note that, later in that case's history, the trial court granted the law firm's
 27 motion to compel arbitration of the plaintiff's discrimination claims. This decision was upheld by the
 28 Sixth Circuit on the ground that the plaintiff's assertion of "claims of inequitable compensation meted
 out on a discriminatory basis, 'relate[d] to' the Partnership Agreement, which sets forth the method of
 compensation for percentage partners." *Panepucci v. Honigman Miller Schwartz & Cohn LLP*, 281 F.
 App'x 482, 485 (6th Cir. 2008).

arbitration has the burden of proving that the arbitration provision is unconscionable.”). She has failed to meet that burden here.

C. If Appropriately Before this Court and If *Armendariz* Applies, the Parties’ Agreement is Nevertheless Enforceable as it Suffers No Procedural or Substantive Unconscionability.

1. The Parties’ Contract is Not a Contract of Adhesion and Suffers No Procedural Unconscionability as a Result.

The “facts” Plaintiff musters to claim that the ADR Provision is adhesive are manufactured. She has presented no evidence, nor any foundation for a claim that the arbitration provision in the Partnership Agreement was presented on a take it or leave it basis. She never claims to have attempted to negotiate the contract. She does not claim to know if others have. Further, Plaintiff did not sign the agreement under the sword of Damocles. She was given ample time to review the contract **both** times she signed it. And, despite her intimations to the contrary, Plaintiff could have remained a Sedgwick contract partner without signing the Partnership Agreement. **SEALED**

Sedgwick has many long term contract partners, one going on 5 years with the firm and non-mutual separations are extremely rare. (Celebrezze Reply Decl., ¶ 2). In fact, between January 1, 2012 and the present there have been 18 contract partner separations, and **only one** was non-mutual. (*Id.*) Further, this single, non-mutual separation was not due to any refusal on the part of the contract attorney to sign the Partnership Agreement. (*Id.*) Plaintiff’s purported Hobson’s Choice between signing the contract and “losing her job” (Pl. Opp. at 12:25) is simply untrue. (*See* Celebrezze Reply Decl., ¶ 2). Her claim that she had to sign the amendment to the agreement or forgo compensation is also untrue. There was no exploding offer, and no impending time limit on Plaintiff’s signature of the amendment. (Celebrezze Reply Decl., ¶ 10). To the contrary, Plaintiff describes in detail how she waited months to sign the Partnership Agreement the first time around. (Ribeiro Decl. ¶¶ 21; *see id.* at ¶ 22 (“Between the time I was selected for Non-Equity Partner in November 2011 and when I signed the acknowledgment form on February 7, 2012”). As for the amendment itself, Plaintiff chose to sign it in early December, knowing her additional compensation would be paid in

roughly 2 weeks. (Ribeiro Decl. ¶ 18) **SEALED**

id. at Exh. B §IX(A)(c)). Had she desired to, she could have waited to sign or refused to sign the agreement until after that compensation was paid. At least eight partners did not sign the amendment until January 2013. (Celebrezze Reply Decl., ¶ 10). There simply was none of the manufactured duress Plaintiff's brief works so hard to create.

2. The Parties' Agreement is not Substantively Unconscionable

As shown above, Plaintiff has failed to meet her burden to show that the arbitration agreement was a contract of adhesion. Because there is no indicia of procedural unconscionability, the analysis ends. *Armendariz v. Foundation Health Psychcare Svcs., Inc.*, 24 Cal.4th 83, 114 (2000) (to be rendered unenforceable, an agreement must be *both* procedurally and substantively unconscionable); *accord*, *Arguelles-Romero v. Superior Court*, 184 Cal.App.4th 825, 837 (2010).

Even were the agreement adhesive, the degree of procedural unconscionability would be very low under these circumstances.

[Plaintiff] is not an uneducated, low-wage employee without the ability to understand that [s]he was agreeing to arbitration. [Sh]e was the opposite—a highly educated attorney, who knowingly entered into a contract containing an arbitration provision in exchange for a generous compensation and benefits package. In such circumstances, the courts have found a minimum degree of procedural unconscionability. *Dotson v. Amgen, Inc.*, 181 Cal. App. 4th 975, 981 (2010).

“Because the degree of procedural unconscionability is minimal, the agreement is unenforceable only if the degree of substantive unconscionability is high.” *Id.* at 982.

a. **SEALED**

SEALED

Plaintiff attempts to argue that no such agreement was reached by citing to earlier discussions regarding modifications: to wit, emails sent by Plaintiff on May 4, 2016 (Wood Decl. ¶ 16) and a

1 response from Sedgwick on May 11, 2016 (Wood Decl. ¶ 17). This is completely disingenuous.

2 **SEALED**

12 **SEALED**

23 *Mohamed v. Uber Techs., Inc.*, ___F.3d___, *slip op.*, No. 15-16178, 2016
24 WL 4651409, at *7 (9th Cir. Sept. 7, 2016) (where arbitration provision provides for cost sharing, but
25 employer agrees to pay the costs after-the-fact, employees are able to effectively vindicate their statutory
26 rights).

b. **SEALED**

SEALED

In

California, such a limitation is fully enforceable. Parties are “permitted to agree to something less than the full panoply of discovery provided in Code of Civil Procedure section 1283.05.” *Armendariz*, 24 Cal.4th at 106. Indeed, “a limitation on discovery is one important component of the ‘simplicity, informality, and expedition of arbitration.’” *Id.* at 106 n.11, quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991)).

SEALED

While Plaintiff now tries to recharacterize Sedgwick’s acceptance of her offer as the offer itself, her attempt is unavailing. She has failed to meet her burden here to show the discovery provisions with and without the modifications are unenforceable under California law.

c. **SEALED**

Plaintiff has filed counterclaims in the JAMS arbitration covering the claims brought in the instant civil action. (Wood Decl. Exh. G). **SEALED**

Furthermore, in California, commencing a civil action tolls any statute of limitations in an arbitration agreement “from the date the civil action is commenced until 30 days after a final determination by the court that the party is required to arbitrate the controversy, or 30 days after the final termination of the civil action that was commenced and initiated the tolling, whichever date occurs first.” Cal. Code Civ. Proc. § 1281.12; *see Pearson Dental Supplies, Inc. v. Superior Court*, 48 Cal. 4th 665, 673 (2010). These are similarly tolled while the charge of discrimination is pending. *Id.*

Accordingly Plaintiff has failed to meet her burden to show the high degree of substantive unconscionability required for this Court to ignore their agreement. **SEALED**

SEALED, the appropriate remedy is for it to be stricken. *Lara v. Onsite Health, Inc.*, 896 F.Supp.2d 831, 848 (N.D.Cal. 2012).

d. Plaintiff's Only Argument Against the Adequacy of the Tribunal is Similarly Premised **SEALED and is Similarly Flawed.**

Because of the tolling described above, **SEALED**

This issue is therefore moot.

Plaintiff piles on to her statute of limitation argument with a parade of horrors — **SEALED**

Again, because of the tolling statutes **SEALED**, this is not a realistic outcome. Further, it is questionable whether such a waiver is even a violation of federal or California law. *Pearson Dental Supplies, Inc.*, 48 Cal.4th at 681. Finally, “[e]ven assuming an arbitration clause purporting to override the statutory jurisdiction of an administrative adjudicator would violate California law, state law would be preempted when applied to an arbitration agreement covered by the Federal Arbitration Act.” *Id.* Accordingly, Plaintiff has failed to meet her burden and the Parties’ agreement must be enforced.

e. **SEALED**

She Has Not.

SEALED

This argument has no merit.

1 **3. The Matters to Be Litigated Here Clearly Fall within the Scope of the**
 2 **Arbitration Provision.**

3 **SEALED**

4 The
 5 gravamen of Plaintiff's complaint is that she, as a partner in the firm, was unfairly compensated and was
 6 not elected to the equity partnership. **SEALED**

7 As articulated succinctly in a sister circuit, Plaintiff's "claims of
 8 inequitable compensation meted out on a discriminatory basis, 'relate to' the Partnership Agreement,
 9 which sets forth the method of compensation for [non-equity] partners." *Panepucci v. Honigman Miller*
 10 *Schwartz & Cohn LLP*, 281 F. App'x 482, 485 (6th Cir. 2008). Accordingly, Plaintiff has failed to meet
 11 her burden to show her claims in this action are not in any way connected to matters set forth in the
 12 Partnership Agreement.

13 **a. The Handbook Does Not Create a Contract Between the Parties and is**
 14 **Irrelevant Regardless.**

15 To make out a prima facie case of contract formation, Plaintiff must show:

- 16 1. That the contract terms were clear enough that the parties could understand what each
- 17 was required to do;
- 18 2. That the parties agreed to give each other something of value; and
- 19 3. That the parties agreed to the terms of the contract.

20 California Civil Jury Instructions 302.

21 Plaintiff fails to even attempt such a showing with regard to the Partner Handbook and so fails in
 22 her burden here. Further, as it relates to her claim that her employment discrimination and equal pay
 23 claims, such an argument cannot be made. A party cannot contract to do what it is already required to
 24 do under the law. This is because offering to do what one is legally required to do has no value; there is
 25 no consideration. *See, e.g., Podolsky v. First Healthcare Corp.*, 50 Cal.App.4th 632, 655 (1996), as
 26 modified (Nov. 5, 1996), as modified (Nov. 20, 1996). Likewise, the Partnership Agreement is an
 27 express contract and Plaintiff assented to its terms not once, but twice. "[T]here cannot be a valid
 28 express contract and an implied contract, each embracing the same subject, but requiring different

results. The express term is controlling” *Starzynski v. Capital Public Radio*, 88 Cal.App.4th 33, 37-39 (2001). **SEALED**

Accordingly, Plaintiff has failed to meet her burden here.

III. CONCLUSION

For the foregoing reasons, defendant Sedgwick LLP respectfully requests that the Court order partner Traci Ribeiro to comply with the ADR Provision of the Partnership Agreement she executed – and whose benefits she has enjoyed for nearly five years – and arbitrate her claims based on allegedly discriminatory compensation and failure to be elected to equity partnership. **SEALED**

Sedgwick further requests that the Court stay the instant action pending completion of the arbitration.

DATED: September 27, 2016

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By: /s/ Nick C. Geannacopulos

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